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### The Amending Clause in the New York Constitution and Conventionphobia

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## The Amending Clause in the New York Constitution and Conventionphobia

By Gerald Benjamin\*

The amending clause is the nineteenth of the New York State Constitution's twenty articles.<sup>1</sup> Followed only by the enacting clause,<sup>2</sup> for all intents and purposes this is the document's final word. Well, maybe not the final word. An alternative is to think of this amending clause as a part of an ongoing several-centuries-long conversation. The clause is a message from one past group of designers and drafters of New York's governing system, the 1846 Constitutional Convention majority, to all of us who gave them the charge to "secure [for us] the blessings of freedom,"<sup>3</sup> that is to "we the people" of New York:

*Here it is, our best effort to design governing institutions for you, empower and limit them, create balance among them, specify how those who will operate them be chosen and held accountable—in short, create for us all a representative democracy.*

*Now, nobody is perfect. Certainly, we don't think we are. We know that actual experience is a*

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1. N.Y. CONST. art. XIX.

2. N.Y. CONST. art. XX.

3. N.Y. CONST. of 1846, art. XIII, § 2; DEBATES AND PROCEEDINGS IN THE NEW-YORK STATE CONVENTION FOR THE REVISION OF THE CONSTITUTION 851-852 (1846) [hereinafter DEBATES & PROCEEDINGS].

*great teacher.*

*As they govern in the future, those we elect to operate this governance system, in the manner that this constitution specifies, might find flaws in it or even determine that with the passage of time an alternative set of ideas has arisen that would be better at securing the blessings of freedom. So, we provide here for those in government to ask us, the people, for specific changes—amendments or for permission to start a process at some later time to choose another group like us with its sole job to develop that alternative—constitutional revision.*

*Mind you, we do not propose to allow those we choose to run the government day-to-day in accord with this constitution to make these changes themselves. The institutions that they populate are created in our constitution by “we, the people”—and therefore changes in these have to come back for approval by we the people of New York of a later day, as in accord with the enduring purpose of securing the blessings of liberty for all.*

*But, in thinking this through, we designers and drafters worried that at some future time those running this governmental system, the one that we are giving to you the people in this draft constitution to consider for approval through a direct participatory process—a statewide referendum vote—may not recognize what others outside the government regard as flaws in this system, maybe even because they and their friends—those who are in charge—personally or politically benefit from the way things work, the status quo. So, we designers and drafters decided to create a way around the self-interest of those in power. That’s why we ask you to agree to ask yourselves every twenty years whether you are satisfied with how this governance system we propose for you in this constitution is actually working.*

*That question is “Shall there be a convention  
to revise the constitution and amend the same?”<sup>4</sup>*

So we are gathered here today, March 24, 2017, in White Plains, NY, the place in which our Provincial Congress received the Declaration of Independence, to enter into a conversation about what our answer should be to a question written for us 171 years ago in Albany, our state capitol.<sup>5</sup>

Though popular sovereignty was a core idea of the Revolutionary Era, it took a while for New Yorkers to invent a way for bringing people formally into redefining the structures and processes of governance.<sup>6</sup> The state’s first constitution was not adopted at a convention, but by the following (Fourth) Provincial Congress, albeit with a special mandate “to institute and establish a government.”<sup>7</sup> The 1801 Convention was called by the legislature; its work was not offered for public approval.<sup>8</sup> In another incremental step, the adoption of the work of the conventions of 1821 and 1846, both created by the legislature, were made subject to popular referendum.<sup>9</sup>

“Faced with mounting debts, charges of legislative corruption and inefficiency, and urgent decisions on the future of the state’s development policy,” one leading authority wrote of the era in which the 1846 constitution was adopted, “New Yorkers began to reevaluate the role of government in society and to question some of the basic premises of their system.”<sup>10</sup> The new amending clause, with an independent role for the people not only in ratifying but in initiating the constitutional change process, was one element in that constitution’s broad effort to democratize state government.<sup>11</sup> The required

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4. Narrative by author, Gerald Benjamin.

5. See DEBATES & PROCEEDINGS, *supra* note 3, at 851-52; 1 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 226 (1906).

6. LINCOLN, *supra* note 5, at 102 (noting that “[t]he discussion and agitation of the subject of constitutional reform, which had continued many years, bore little fruit.”).

7. PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 36 (1996) [hereinafter ORDERED LIBERTY].

8. *Id.* at 66.

9. *Id.* at 109-10.

10. L. RAY GUNN, THE DECLINE OF AUTHORITY PUBLIC ECONOMIC POLICY AND POLITICAL DEVELOPMENTS IN NEW YORK STATE, 1800-1860, at 21 (1988).

11. See DEBATES & PROCEEDINGS, *supra* note 3, at 851-52 (“[t]he

referendum question on calling a convention has been asked of every generation of New Yorkers since.<sup>12</sup>

The ballot question will be asked for the seventh mandated time this coming November 7, 2017 (that's what brings us here today).<sup>13</sup> With the major league baseball season in the offing, I can't resist an analogy. The result has been a base hit, two home runs, and, lately, three strikeouts. The mandatory question resulted in conventions in 1867, 1894, and 1938, all with Republican majorities.<sup>14</sup> The product of the 1867 Convention failed to gain popular ratification, though it had important long-term effects on New York governance.<sup>15</sup> The 1894 Convention gave us a new constitution, New York's fourth.<sup>16</sup> The 1938 Convention is famous for its positive rights achievements.<sup>17</sup> But most recently, in 1957, 1977 and 1997 New Yorkers have rejected taking up the opportunity to hold a constitutional convention.<sup>18</sup>

A phobia to the idea has developed, not only in New York but across the nation.<sup>19</sup> The mandatory question has not resulted in a convention in New York for seventy-nine years.<sup>20</sup> No state has held a constitutional convention for several

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Convention [has] therefore presented the subject in the form that will best enable the people to judge between the old and the new Constitution. If the Constitution now proposed by adopted, the happiness and progress of the People of this State, will . . . be in their own hands.”).

12. N.Y. CONST. art. XIX § 2.

13. Gerald Benjamin, “*All or Nothing at All*” *Changing the Constitution – The Reform Dilemma*, in NEW YORK’S BROKEN CONSTITUTION: THE GOVERNANCE CRISIS AND THE PATH TO RENEWED GREATNESS 285, 297 (Peter J. Galie, Christopher Bopst & Gerald Benjamin eds., 2016) [hereinafter NEW YORK’S BROKEN CONSTITUTION]. Additionally, the legislature has put the question on the ballot twice in 1915 and 1967. *Id.*

14. ORDERED LIBERTY, *supra* note 7, at 119, 159-60, 232-33.

15. *Id.* at 131-32.

16. N.Y. CONST. of 1894; 4 WILLIAM H. STEELE, REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK MAY 8, 1984 TO SEPTEMBER 29, 1984, at 1276-77 (1900).

17. *See* ORDERED LIBERTY, *supra* note 7, at 238.

18. *See* Benjamin, *supra* note 13, at 297.

The work of conventions called at legislative initiative, in 1915 and 1967, were rejected at the polls. *Id.* The 1915 majority was Republican; that of 1967 was Democrat. *See* ORDERED LIBERTY, *supra* note 7, at 188, 307-08.

19. *See* Gerald Benjamin & Thomas Gais, *Constitutional Conventionphobia*, 1 HOFSTRA L. & POL’Y SYMP. 53, 69-71 (1996).

20. *See* ORDERED LIBERTY, *supra* note 7, at 233.

decades.<sup>21</sup> The half-century since the 1967 convention, called by the legislature, is the longest time-period since such a convening in New York state history.<sup>22</sup>

So, the sovereign people have forborne. One notion is that this may be the result of their overall satisfaction with their state government: “*We don’t need a convention; government is working well.*” This proposition is problematic on its face. For starters, the circumstances that faced New York in 1846 are eerily familiar today: corruption in the legislature (and the executive), economic development challenges, and burdensome debt.<sup>23</sup> Additionally, we are heavily taxed, have a judiciary and local government arrangements that cry out for consolidation and reform, endure non-competitive gerrymandered legislative districts, finance public education in a problematic way, and suffer abysmal election administration and voter turnout. All is definitely not ok. Something else, or some things else, makes the idea of holding a state constitutional convention less attractive in the last hundred years than it was in the previous hundred years.

An initial concern is that the mandated convention question added by the drafters in 1846 is unlimited. This means a constitutional convention cannot be called with a focused agenda. Rather, once a convention is convened, it may change anything in the constitution. Since the mid-nineteenth century New York, one-by-one, and usually at conventions, has added many constitutional provisions of particular interest to interests

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21. Reid Wilson, *Rhode Island Could Become the First State in 30 years to Hold a Constitutional Convention*, WASHINGTON POST (Mar. 13, 2014), [https://www.washingtonpost.com/blogs/govbeat/wp/2014/03/13/rhode-island-could-become-the-first-state-in-30-years-to-hold-a-constitutional-convention/?utm\\_term=.6fb5c073d622](https://www.washingtonpost.com/blogs/govbeat/wp/2014/03/13/rhode-island-could-become-the-first-state-in-30-years-to-hold-a-constitutional-convention/?utm_term=.6fb5c073d622). The most recent state constitutional convention was called by the state of Rhode Island and held in 1986. See R.I. CONST. of 1986; *Introduction: Constitution of the State of Rhode Island and Providence Plantations*, STATE OF R.I. GEN. ASSEMBLY, <http://webserver.ri.lin.state.ri.us/RiConstitution/constintro.html> (last visited Aug. 26, 2017).

22. J.H. Snider, *Opportunity for Reform: Educate New Yorkers on Constitutional Convention*, TIMES UNION <http://www.timesunion.com/tuplus-opinion/article/Commentary-Opportunity-for-reform-11210916.php> (last updated June 12, 2017, 9:47 AM).

23. See ROBERT B. WARD, NEW YORK STATE GOVERNMENT 15-18 (2d ed. 2006); 2 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 10 (1906) (noting by 1846, “[y]ear by year this dissatisfaction grew and found expression in prolonged discussion and numerous proposed amendments.”).

that have become increasingly powerful in the state. Civil service guarantees and pension protections are of great importance to organized public employees.<sup>24</sup> Environmentalists are deeply committed to the “forever wild” protection afforded the Catskill and Adirondack preserves.<sup>25</sup> Advocates for the poor greatly value the unique state constitutional protections afforded them in New York.<sup>26</sup> It is unlikely that any convention comprised of delegates elected in New York would remove or even mitigate these strongly supported provisions. Yet the aggregated effect of the concerns of particular interests—even in the face of pandemic governmental dysfunction—is deep skepticism about calling a convention.<sup>27</sup>

For much of the twentieth century, there was a political center that favored calling constitutional conventions in New York.<sup>28</sup> As the great Democrat Governor Alfred E. Smith noted, the redistricting formula written into the 1894 Constitution made the state legislature “constitutionally Republican.”<sup>29</sup> With Republicans dominant in that branch there was no hope of changing this stranglehold through the legislature, so Democrats sought their opportunity in two ways: through

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24. See N.Y. CONST. art. V, § 7 (protecting pension and retirement benefits); *id.* art. XVI, § 5 (excluding pensions from taxation); ORDERED LIBERTY, *supra* note 7, at 234 (discussing the 1938 enactment of the “Labor Bill of Rights” found in N.Y. CONST. art. I, § 17).

25. See N.Y. CONST. art. XIV, § 1; Paul Bray, “Forever Wild” *The Treatment of Conservation and the Environment by the New York State Constitution*, in NEW YORK’S BROKEN CONSTITUTION, *supra* note 13, at 243, 243-44 (discussing the 1894 enactment commonly referred to as the “forever wild” provision).

26. See N.Y. CONST., art. XVII, § 1; ORDERED LIBERTY, *supra* note 7, at 238 (the Convention of 1938 “established an affirmative social right which any individual may demand from the government. It required the state to assume a major role in the field of social welfare.”).

27. See Nathan Tempey, *Pandora’s Box or Reset Button? Unions, Activists Square Off Over Upcoming Constitutional Convention Vote*, GOTHAMIST (June 6, 2017, 10:42 AM), [http://gothamist.com/2017/06/06/ny\\_constitutional\\_convention.php](http://gothamist.com/2017/06/06/ny_constitutional_convention.php); see also Snider, *supra* note 22.

28. Benjamin, *supra* note 13, at 296-97.

29. Henrik N. Dullea, *We the People*, in MAKING A MODERN CONSTITUTION: THE PROSPECTS FOR CONSTITUTIONAL REFORM IN NEW YORK 21, 25 (Rose M. Bailly & Scott N. Fein eds., 2016) [hereinafter MAKING A MODERN CONSTITUTION]; Jeffrey Wice & Todd A. Breitbart, *These Seats May Not Be Saved: A Fair and Rule-Bound Legislative Reapportionment Process*, in NEW YORK’S BROKEN CONSTITUTION, *supra* note 13, at 113, 126-27.

litigation and by the calling of a constitutional convention.<sup>30</sup> An example: the 1915 Convention was called on legislative initiative during a brief period of Democrat legislative control.<sup>31</sup> But after the one-person-one-vote United States Supreme Court decisions of the 1960's,<sup>32</sup> and the 1974 Democrat capture of the state assembly,<sup>33</sup> both major parties gained a stake in gerrymandering: the Republicans in the senate and the Democrats in the assembly.<sup>34</sup> The result was a division of the spoils through collaboration in a bi-partisan gerrymander.<sup>35</sup>

It is no surprise that the state legislature resists calling a constitutional convention through a referendum.<sup>36</sup> After all, the process was designed to bypass it.<sup>37</sup> More important than the fact of opposition is the great priority the legislature has recently given to assuring that no convention occurs.<sup>38</sup> Interest groups seeking legislative support for their goals know that supporting a convention is not a good idea.<sup>39</sup> Appropriations for a bipartisan commission to prepare for the mandatory referendum vote were formerly common. In 1993, legislative leaders refused to give support to a commission proposed by Governor Mario Cuomo to prepare for the 1997 vote (he found a way to proceed without them).<sup>40</sup> In 2016, the leaders insisted that the one-million-dollar

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30. Dullea, *supra* note 29, at 26-28.

31. ORDERED LIBERTY, *supra* note 7, at 188-89.

32. See Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964).

33. See Josh Barbanell, *Democratic Edge Rises in New York Assembly*, N.Y. TIMES (Nov. 3, 1982), <http://www.nytimes.com/1982/11/03/nyregion/democratic-edge-rises-in-new-york-assembly.html?mcubz=1>; see also Wice & Breitbart, *supra* note 29, at 126-127.

34. Barbanell, *supra* note 33.

35. *Id.*

36. John Dinan, *The Political Dynamics of Mandatory State Constitutional Convention Referendums: Lessons from the 2000s Regarding Obstacles and Pathways to Their Passage*, 71 MONT. L. REV. 395, 421 (2010).

37. *Id.*

38. Snider, *supra* note 22.

39. *Id.*

40. See Kevin Sack, *Cuomo Calls for Early Vote on Constitutional Convention*, NY TIMES (May 27, 1993), <http://www.nytimes.com/1993/05/27/nyregion/cuomo-calls-for-early-vote-on-constitutional-convention.html?mcubz=1>; Lisa W. Foderaro, *A Constitutional Convention for New York? This May Be the Year*, NY TIMES (July 5, 2017), <https://www.nytimes.com/2017/07/05/nyregion/constitutional-convention-voting-new-york.html?mcubz=1>.



appropriation proposed by Governor Andrew Cuomo for a preparatory commission be removed from the state budget.<sup>41</sup> As we meet, such a commission has not been formed.<sup>42</sup> Comparative research shows that substantive preparation and gubernatorial support is key to a successful referendum vote.<sup>43</sup> Without these, opponents—sometimes the very persons who have denied the resources—argue that a convention is unwise because the state is unprepared.

In reaction to the seven-yearlong partisan political deadlock centered on the delegate selection process that blocked the convening of the constitutional convention called by the voters in 1886,<sup>44</sup> delegates in 1894 sought to create a process for future conventions that was “self-executing” once they were authorized by the voters.<sup>45</sup> The Republican majority entrenched their preferred delegate selection process in the constitution, placing it out of the reach of ordinary legislative processes.<sup>46</sup> It required three delegates to be selected from senate districts functioning as multi-member districts, with fifteen chose at-large statewide.<sup>47</sup>

Because senate districts have long been gerrymandered to produce Republican majorities, this looks deeply suspect to Democrats.<sup>48</sup> Because multi-member districts may be used to diminish the electoral impact of racial and ethnic minorities—most of whom vote Democrat—and therefore raise red flag under

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41. See David H. King, *A Post-Budget Test of the Governor's Commitment to a Constitutional Convention*, GOTHAM GAZETTE, (April 18, 2016), <http://www.gothamgazette.com/state/6283-a-post-budget-test-of-the-governor-s-commitment-to-a-constitutional-convention>.

42. Rachel Silberstein, *Constitutional Convention Absent from Cuomo's 2017 Agenda*, GOTHAM GAZETTE (Jan. 19, 2017), <http://www.gothamgazette.com/state/6720-constitutional-convention-absent-from-cuomo-s-2017-agenda>.

43. Gerald Benjamin, *Constitutional Change in New York State: Process and Issues*, in MAKING A MODERN CONSTITUTION, *supra* note 29, at 57, 71; Snider, *supra* note 22.

44. ORDERED LIBERTY, *supra* note 7, at 159.

45. *Id.* at 179.

46. Benjamin, *supra* note 43, at 63.

47. N.Y. CONST. art XIX, § 2.

48. Wice & Breitbart, *supra* note 29, at 130-131. See generally *Gerrymandering and Relying on the Miscalculation of Prisoners Combine to Violate the U.S. Constitution in New York*, PRISON POLICY INITIATIVE, <https://www.prisonersofthecensus.org/nygerrymander.html> (last visited Sept. 26, 2017).

the (now attenuated) Federal Voting Rights Act,<sup>49</sup> this suspicion is reinforced. This notwithstanding that there are over three million more enrolled Democrats than Republicans in New York State,<sup>50</sup> that current senate districts produce a Democrat majority (though that party does not organize the chamber),<sup>51</sup> and that fourteen senate districts currently elect Black or Hispanic members.<sup>52</sup>

Some of the other procedural specifics added by the 1894 Convention in reaction to its experience—for example those setting dates certain on which delegates were to be elected and the convention called into session, seating delegates if an election outcome was uncertain, and defining a process for filling vacancies<sup>53</sup>—are not currently controversial. But others have caused reformers that likely would otherwise be supportive of a convention to insist on procedural reform before they sign on.

For example, the 1894 Convention found it “prudent” to add a provision that convention delegates be compensated and reimbursed for expenses at the same rate as state legislators, amounts that in that era was specified in the constitution.<sup>54</sup> However, no restrictions were placed upon whom might serve as

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49. Steven Hill, *How the Voting Rights Act Hurts Democrats & Minorities*, THE ATLANTIC (June 17, 2013), <https://www.theatlantic.com/politics/archive/2013/06/how-the-voting-rights-act-hurts-democrats-and-minorities/276893/>.

50. N.Y. STATE BOARD OF ELECTIONS, NYS VOTER ENROLLMENT BY COUNTY, PARTY AFFILIATION, AND STATUS (April 1, 2017), [http://www.elections.ny.gov/NYSBOE/enrollment/county/county\\_apr17.pdf](http://www.elections.ny.gov/NYSBOE/enrollment/county/county_apr17.pdf).

51. Jesse McKinley, *Breakaway Democrats in New York Senate Add Another to Their Ranks*, N.Y. TIMES (Jan. 25, 2017) <https://www.nytimes.com/2017/01/25/nyregion/independent-democratic-conference-republicans-state-senate.html?mcubz=1>.

52. Thomas Kaplan, *G.O.P. Senate Deal: Diversity Takes Back Seat to Power in Albany*, N.Y. TIMES, (Dec. 6, 2012), <http://www.nytimes.com/2012/12/07/nyregion/in-gop-state-senate-deal-diversity-takes-back-seat.html?mcubz=1&mtrref=www.google.com>.

53. N.Y. CONST. of 1894, art. XIV, § 2.

54. *Id.* (“Every delegate shall receive for his services the same compensation and the same mileage as shall then be annually payable to the members of the Assembly.”); *id.* art. III, § 6 (“Each member of the Legislature shall receive for his services an annual salary of one thousand five hundred dollars. The members of either house shall also receive the sum of one dollar for every ten miles . . .”). Regarding the rationale for placing this detail in the constitution see remarks of Louis Marshall, chair of the Committee on Future Amendments. See STEELE *supra* 16, at 893-94.

delegates.<sup>55</sup> Therefore, incumbent legislators and judges who were elected as delegates to later conventions were compensated twice in one year.<sup>56</sup> This “double dipping,” which extended to pension benefits, was almost universally condemned and remains an issue in debates over whether a convention should be called.<sup>57</sup>

Other process concerns are statutory. Unless specific legislation is passed to govern nomination and election of convention delegates, this must be done in accord with existing election law. The process would thus be partisan, and accessible to the influence of big money. Though this might be mitigated by the use of election technology now in place, having to operate under current law would also likely make it difficult to vote for individuals for at-large delegate positions—rather than an entire partisan slate.

Since 1894, changes to the amending process for the New York State Constitution have been minimal. One of some significance concerned mandatory referendum timing.<sup>58</sup> Initially, delegate elections were required to be in next ensuing year in which assembly members were chosen; this was not limiting as the term of the assembly was then one year.<sup>59</sup> In 1936, delegates decided that the next convention vote should be in 1957 (not 1956, twenty years from the vote that called the convention that made this change.)<sup>60</sup> This altered timing would ensure that if a convention were called delegates would be elected in an even-numbered year simultaneous with a gubernatorial election, and the convention itself would occur in an odd-numbered year, bringing more public attention to its work.<sup>61</sup>

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55. 3 CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* 666-670 (1906).

56. *See* N.Y. CONST. of 1894, art. III § 6, (legislators); *id.* art. VI § 12 (judges).

57. *What is the process of the New York State Constitutional Convention?*, CITIZENS UNION, <http://betterny.citizensunion.org/new-york-constitutional-convention-faq/> (last visited Oct. 11, 2017).

58. Benjamin, *supra* note 43, at 57-59.

59. N.Y. CONST. of 1894, art. XIV § 2; *id.* art. II, § 2.

60. Benjamin, *supra* note 13, at 58-59.

61. Franklin Feldman, *A Constitutional Convention in New York: Fundamental Law and Basic Politics*, 42 CORNELL L. REV. 329 (1957).

One less visible potential consequence of this choice was to give New York City greater influence on acceptance of a convention's recommendations, as its mayoral election—stimulating turnout there—was made simultaneous with the referendum on that work.<sup>62</sup> This is a lesser political factor now. City turnout, in general, has dropped significantly over time,<sup>63</sup> and all the biggest upstate counties have their own executives elected in odd-numbered years. However, this change in timing made New York the only state that holds its mandatory referendum on calling a convention in a lower turnout odd-numbered year, with the concomitant smaller statewide electorate.<sup>64</sup> On balance, this likely elevates the influence of organized interests that oppose a convention call.

In anticipation of the 2017 referendum, there have been both constitutional amendments and statutes placed before the legislature to address these procedural concerns.<sup>65</sup> An alternative voting system might mitigate potential voting rights problems. A dual office hold provision could be used to block double dipping. Election law for the sole purpose of delegate election might test ideas for campaign finance reform without any risk to incumbents in state offices. The constitution might be modified to permit the calling of a limited convention. Seeking to make a “yes” vote on the convention call less likely (and reflecting its hostility to the idea), the legislature has failed to act upon any of these proposals.

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62. David H. King, *State Constitutional Convention: Holy Grail or Pandora's Box?*, GOTHAM GAZETTE (Aug. 26, 2015), <http://www.gothamgazette.com/government/5861-state-constitutional-convention-holy-grail-or-pandoras-box> (“New York City voters have historically had the most say over whether there is a constitutional convention as mayoral elections fall at the same time as the ballot question is put to voters.”).

63. Ben Brachfeld, *8%! New Report Shows Shockingly Low Voter Turnout in NYC*, GOTHAM GAZETTE (June 28, 2017), <http://www.gothamgazette.com/city/7036-8-new-report-shows-shockingly-low-voter-turnout-in-nyc>.

64. Benjamin, *supra* note 13, at 58-59; Gerald Benjamin, *The Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context*, 65 ALB. L. REV. 1017, 1044 (2001) (comparing outcome in mandatory referendum states from 1970-2000).

65. SPECIAL COMM. ON VOTER PARTICIPATION, N.Y. ST. BAR ASS'N, FINAL REPORT 69-71 (2013); Rachel Silberstein, *Cuomo Embraces Voting Reform Agenda, But Implementation Poses Challenges*, GOTHAM GAZETTE (Jan. 23, 2017) <http://www.gothamgazette.com/state/6724-cuomo-embraces-voting-reform-agenda-but-implementation-poses-challenges>.

Our nineteenth century forbearers proceeded with faith in democracy and a very American—I would say a very New York—belief in the possibility of progress and improvement. They were participants in a flow of history in which state leaders were routinely elected once in a generation—in 1801, 1821, 1846, 1867, and 1894—to revise, renew and reform New York’s polity.<sup>66</sup> They shared the assumption that the best of us in each generation could if we wished, find the will and talent to produce a better system to serve us all. And each time a convention convened they were—at least in some measure—affirmed in this belief.

That was and is the premise of our amending clause: that we the people can do better. In that it is a sort of reserve clause, at least in intent not unlike the Tenth Amendment of the U.S. Constitution, reserving power to the sovereign people to “secure the blessings of liberty.”<sup>67</sup>

Politics in the nineteenth century were rough and tumbled. Partisan behavior was rarely grounded in reasoned debate. Voter participation was higher than it is now,<sup>68</sup> but not in referenda, especially New York referenda on constitutional change.<sup>69</sup> Yet our nineteenth century forbearers could not have imagined a world like ours, in which—admittedly sometimes based on recent hard experience—democracy is feared as much or more than it is embraced. A world in which voters at the polls routinely expressed their rage more than their reason, and are encouraged in this predisposition by billiondollar campaigns and skilled image manipulators. A world in which most know little of intricately balanced polities. A world of political saviors, not political systems.

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66. Peter J. Galie & Christopher Bopst, *Constitutional Revision in the Empire State: A Brief History and Look Ahead*, in MAKING A MODERN CONSTITUTION *supra* note 29, at 79, 86-87. Interestingly, a convention call place on the ballot by the legislature in 1858 failed at the polls. See ORDERED LIBERTY, *supra* note 7, at 118.

67. U.S. CONST. amend. X; U.S. CONST., pmb.

68. Nicholas Jahr, *Forty Years of Freefall in New York Voter Turnout*, GOTHAM GAZETTE (Nov. 13, 2014) <http://www.gothamgazette.com/index.php/government/5432-forty-years-of-freefall-in-new-york-voter-turnout>.

69. Gerald Benjamin & Carling Devin, *Voter Participation and Persistence: Understanding the Role of Community in Voter Turnout During Off-Year Elections in New York State*, 7 ALB. GOV’T L. REV. 545, 572-73.

In this sort of world, thoughtful people strongly committed to improving our institutions are put off by change based upon popular action, especially if it is called constitutional change. What evidence we have suggests that many New Yorkers do not even know that we have a state constitution.<sup>70</sup> It is not distinguished in the public mind from the sacrosanct national Constitution. Even more confounding, opening the national document to change through a convention is currently under active discussion in some quarters.<sup>71</sup> Such a move is anathema to people of a great range of persuasions, myself among them. So we abandon a chance at restoring democracy in our state in part out of ignorance, in part out of fear.

A generation ago, when confronted with the argument that New Yorkers would not support the constitutional convention he favored because of the lack of a shared reform agenda, Governor Mario Cuomo counseled “faith in the people: faith in democracy.”<sup>72</sup>

But twenty years later, do we trust the people? More and more, the answer is “No.” In fact, the people do not trust each other. In a recent survey, only about a third of Americans agreed that “most people can be trusted.”<sup>73</sup> In the same survey, forty percent of respondents said that they had lost faith in democracy.<sup>74</sup> Another six percent said that they had never had such faith.<sup>75</sup> Thus we move on the path from sovereigns to subjects.

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70. Dullea, *supra* note 29, at 23.

71. Lisa W. Foderaro, *A Constitutional Convention for New York? This May Be the Year*, NY TIMES (July 5, 2017), <https://www.nytimes.com/2017/07/05/nyregion/constitutional-convention-voting-new-york.html?mcubz=1> (discussing support by NYSBA and Citizens Union, among others).

72. See Gerald Benjamin & Mario M. Cuomo, Commentary, *New York Needs a Constitutional Convention*, WALL STREET JOURNAL (July 10, 2009, 12:01 AM), <https://www.wsj.com/articles/SB124718250653620239>.

73. Nathan Persiley & Jon Cohen, *Americans are Losing Faith in Democracy-and Each Other*, WASHINGTON POST (Oct. 14, 2016), [https://www.washingtonpost.com/opinions/americans-are-losing-faith-in-democracy—and-in-each-other/2016/10/14/b35234ea-90c6-11e6-9c52-0b10449e33c4\\_story.html?utm\\_term=.cf8c9c1efcd0](https://www.washingtonpost.com/opinions/americans-are-losing-faith-in-democracy—and-in-each-other/2016/10/14/b35234ea-90c6-11e6-9c52-0b10449e33c4_story.html?utm_term=.cf8c9c1efcd0).

74. *Id.*

75. *Id.*

Loss of faith in democracy: at bottom, this is the key reason that our mandatory referendum convention call has stopped working.

Yet this method of changing our state constitution is all we have. It is only through the use of that process that we can begin to restore this faith, to press the reset button, to reform and re-people our sclerotic, failing half-democratic governing institutions. We are told that we can change our system by the other route, through the legislature, that indeed we have been offered and have passed specific constitutional amendments in this manner hundreds of times. This proposition is a specious half-truth. Yes, there has been legislative initiated change, but not on fundamentals and rarely on matters that challenge those in power and the institutions they lead or serve.

In the years since our amending clause was adopted and refined, other more focused institutions have been invented and used in other states to allow the sovereign people to bypass those in power if they feel the need to do so.<sup>76</sup> One is the constitutional initiative.<sup>77</sup> Another is the constitutional commission.<sup>78</sup> Still, another is the limited constitutional convention. We should consider these, and perhaps adopt them. But we can only do so if we call a convention.<sup>79</sup>

We must seize the opportunity this fall to enter New York's centuries-long governance conversation and reshape our constitutional system for our time and circumstances. We have the capacity to achieve excellence in our state and local governments. Now we must demonstrate the will. Our nineteenth century method for unmediated constitutional reform is admittedly a blunt instrument. But it the only tool we have if we are to fashion serious changes in how we govern ourselves in New York. We must pick it up on November 7, 2016, and make sure to put it to good use in the years ahead.

I'll be there to help. Join me.

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76. See Benjamin, *supra* note 13, at 300-01.

77. *Id.*

78. *Id.*

79. See Galie, *supra* note 66, at 91-101.